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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1110

GRAND LODGE HALL ASSOCIATION, I. O. O. F. OF INDIANA, A CORPORATION, ET AL.,

Appellants,

vs.

RALPH F. MOORE, AS AUDITOR OF MARION COUNTY, INDIANA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

STATEMENT AS TO JURISDICTION ON APPEAL

MAY IT PLEASE THE COURT:

The appellants in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represent:

I

Statutory Provision Sustaining Jurisdiction Pursuant to Supreme Court Rule 12

The Act of February 13, 1925, C. 229, § 1, 43 Stat. 937, being Judicial Code Section 237, as amended (U. S. C. A. Tit. 28, Section 344), provides in part as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a

treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Act of January 31, 1928, C. 14, Sections 1 and 2, as amended April 26, 1928, 45 Stat. 54, 466 (U. S. C. A. Tit. 28, Sections 861a, 861b), provides as follows:

"The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by Appeal.

"The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

U. S. C. A. Title 28, 861a, 861b.

II

State Statute Validity of Which Is Involved

This appeal involves the validity of Section 3 of Chapter 146 of the Acts of the General Assembly of Indiana for the year 1937, Indiana Acts 1937, Ch. 146, pp. 814, 815, 816, which purported to deprive appellants of a tax exemption granted by the law under which they were incorporated. The title and Section 3 of the Act of 1937 read as follows:

"Chapter 146

(H. 308. Approved March 9, 1937)

"An Act to amend sections 1, 5 and 9 and the title of an act entitled 'An act concerning the organization

of foundation or holding companies and prescribing their powers and duties,' approved March 10, 1921."

• • • • • • •

"Sec. 3. That section 9 of the above entitled act be amended to read as follows: Sec. 9. Such corporation may hold and convey any real estate necessary for the transaction of its business or the execution of any trust. Any and all real and tangible personal property held by any such corporation and which is both occupied and used by such corporation exclusively for the purposes and objects of such corporation, shall be exempt from taxation. And any and all intangible personal property and the proceeds and income thereof, held by any such corporation exclusively for the purposes and objects of such corporation, also shall be exempt from taxation: Provided, however, that all real and tangible personal property now held by such corporations, or hereafter acquired by them in foreclosure of present mortgage obligations or in settlement or payment of present obligations, for the purposes and objects of such corporations, but not occupied and used exclusively for such purposes and objects, shall continue to be exempt from taxation, if owned by such corporation until March 1, 1944, but from and after March 1, 1944, shall be subject to taxation: Provided further, however, That all real and tangible personal property acquired by any such corporation after the effective date of this act and not specifically exempt hereunder shall be subject to taxation."

Indiana Acts 1937, p. 815.

The specific effect of the above amendment is to deprive appellants of a previously existing tax exemption on income earning real estate by limiting the exemption to real estate "both occupied and used" for exempt purposes.

III

Date of Decree and Date of Application for Appeal

The decree sought to be reviewed was entered by the Supreme Court of Indiana on the 11th day of December, 1946 (R. p. 255).

(Not yet officially reported. Unofficially reported as *Grand Lodge Hall Ass'n, I. O. O. F. et al.* v. *Moore, County Auditor, et al.* (1945), 71 N. E. 2d 19.)

The application for appeal was presented on the 11th day of February, 1947 (R. 271).

IV

Manner in Which the Federal Question Involved Was Raised and Decided

This action was begun by complaint (R. pp. 4-58) wherein appellants alleged that certain real estate owned by each of them was exempt from taxation by virtue of a contract created by the Act of the Indiana Legislature under which they were incorporated and particularly section 9 thereof (Indiana Acts, 1921, Ch. 246, p. 130, Sec. 9, set out in full in appendix, p. 21) (R. p. 34, ll. 16-25) and that the above cited amending act of 1937, which purported to deprive them of that exemption was "unconstitutional and in violation of section 10 of Article I of the United States as impairing the obligation of a contract" (R. p. 35, ll. 9-14). This challenge to the validity of the Act of 1937 was repeated by motion for new trial (R. p. 230, l. 19 to p. 31, l. 4; p. 234, ll. 11-24; p. 238, l. 16 to p. 239, l. 2), by exceptions to the trial court's conclusions of law (R. p. 226, ll. 17-22; ll. p. 227, ll. 8-13), and amended conclusions of law (R. p. 246, l. 25 to p. 248, l. 21) and by appropriate assignment of error in the Supreme Court of Indiana, directed

to the conclusions of law and the ruling on motion for new trial (R. p. 1, l. 22, to p. 2 l. 6).

The Federal question thus raised was the sole question decided adversely to appellants by the Supreme Court of Indiana, which, although holding that the claimed tax exemption had *originally been* granted by the Act of 1921, concluded:

> "Looking at the holding company act of 1921 as a whole, in the light of the opinions of the United States Supreme Court above quoted, and particularly the decision in *Christ Church v. Philadelphia County*, we are unable to find in it the intent to promise these corporations more than a present tax exemption, a privilege that might in the wisdom of a future General Assembly be and was taken away by the Act of 1937."

V

The Nature of the Case

This is an appeal from a final decree of the Supreme Court of Indiana (the highest court of that state) affirming a decree of the Marion Circuit Court denying to Appellants an injunction against the taxation of certain real estate owned by them and likewise denying a declaratory judgment that the Act of the General Assembly of Indiana under which taxes were imposed (Indiana Acts 1937, Ch. 146, Sec. 3, p. 815) was in violation of Article I, section 10, clause 1 of the Constitution of the United States (Complt. R. pp. 3-37, prayer, p. 36, l. 26 to p. 37, l. 3).

Appellants are corporations organized for religious, educational or charitable purposes under Chapter 246 of the Acts of the General Assembly of the State of Indiana for the year 1921; Indiana Acts 1921, p. 730 (R. p. 205, ll. 19-26, Appendix p. 19). That Act, set out in full in the appendix hereto (p. 19) authorized any nine or more persons to incorporate for the promotion of religious, edu-

cational and charitable purposes *only*, authorized the acquisition by gift, devise, bequest or otherwise, of money or property and use of the principal or income for authorized corporate purposes, prohibited any pecuniary benefit to any member of the corporation except compensation for services actually rendered, and granted tax exemption in the following language:

> "Sec. 9. Such corporation may hold and convey any real estate necessary for the transaction of its business or the execution of any trust. Property held by such corporation exclusively for religious, educational or charitable purpose shall be exempt from taxation."

Subsequent to 1921 and prior to 1937 Appellants were each incorporated for religious, educational or charitable purposes under this Act (R. p. 206, l. 15 to p. 208, l. 24) each acquired valuable real estate (R. p. 208, l. 25 to 209, l. 3; p. 216 ll. 7-11; p. 220, l. 23), the net income from this real estate (after application to expenses and incumbrances) is and had been applied to authorized corporate purposes (R. p. 218, l. 22 to p. 219, l. 27, 212 l. 12 to p. 213, l. 16, 214 l. 10 to p. 215, l. 7; p. 244, l. 22 to p. 245, l. 6), and such real estate was not taxed after its acquisition by Appellants until after the enactment of section 3 of Ch. 146 of the acts of the Indiana General Assembly for the year 1937 (R. p. 209, ll. 22-25; p. 218, ll. 8-21; p. 221, ll. 14-17).

(The above facts, appearing in slightly different phraseology, are stated in the opening paragraph of the opinion of the Supreme Court of Indiana.)

The title and section 3 of such Act of 1937, purporting to amend section 9 of the Act of 1921 is set out above under II.

The Supreme Court of Indiana has squarely decided the Federal question thus presented, affirming the validity of the Act of 1937 on the ground that the Act of 1921 and

appellants' action thereunder did not create a contract protected by Article I, section 10 of the Constitution. In so doing, it held that appellants' real estate *had been* properly exempt under the Act of 1921, thus deciding in appellants' favor the only *non-Federal* issue deemed worthy of discussion (R. Appendix p. 19).

The decision of the Supreme Court of Indiana is challenged in this Court by three assignments of error, as follows:

1. The Supreme Court of the State of Indiana erred in denying the claim of each appellant that the exemption from taxation granted to each of them by Section 9 of Chapter 246 of the Acts of the Indiana General Assembly for the year 1921 was protected from subsequent repeal by the Constitution of the United States, Article 1, Section 10, cl. 1.

2. The Supreme Court of the State of Indiana erred in deciding that Chapter 246 of the Acts of the General Assembly of Indiana for the year 1921 and particularly Section 9 thereof, did not constitute a contract between the State of Indiana and each of the appellants who had incorporated and acted thereon, exempting from taxation the property of each appellant described in their complaint herein, and that such exemption was not protected from repeal by Article 1, Section 10, clause 1 of the Constitution of the United States.

3. The Supreme Court of the State of Indiana erred in deciding that Chapter 146 of the Acts of the General Assembly for the year 1937 which purported to repeal the tax exemption granted to appellants and each of them by the original act of their incorporation (Chapter 246, Acts of the General Assembly of Indiana for 1921), did not impair the obligation of the contract with appellants and each of them found in Chapter 246 of the Acts of the Indiana General Assembly for the year 1921, in violation of Article 1, Section 10, Clause 1 of the Constitution of the United States.

VI

Statement of Ground upon Which It Is Believed the Federal Questions Involved Are Substantial

It is believed that the federal question presented is a substantial one, and that the decision of the Supreme Court of Indiana is erroneous, for the following reasons:

1. The decisions of this Court relied upon by the Supreme Court of Indiana in deciding that appellants incorporation and action taken in reliance upon the Act of 1921 did not constitute a contract are not controlling:

(a) *Rector of Christ Church* v. *Philadelphia County* (1861), 24 How. (65 U. S.) 300, "particularly" relied upon, is not in point. The tax exemption grant there involved was made to an existing charitable corporation which incurred no detriment, made no change of position and conferred no new benefit in reliance upon or as consideration for the grant. There was plainly no contract, because there was no consideration. Here appellants and the donors of their funds have dedicated valuable property to religious, educational and charitable use upon faith of the exemption contained in their incorporating statute.

(b) The circumstances, from which this court inferred, in *Wisconsin & Michigan R. Co.* v. *Powers* (1903), 191 U. S. 379, 48 L. Ed. 229, that the legislature of Michigan did not offer a *promise* of tax exemption as an inducement to build railroads, are not present here. One of these circumstances was that private profit was the motive for the railroad building. Here, absence of private profit to the appellants and their incorporators is a condition of the grant of the privileges (including tax exemption) offered in the Indiana Act of 1921. The act does not purport to offer a mere "chance of benefits to those who comply with its condition", but, on the contrary, is designed to induce action

beneficial only to the public, so that the reason given in the above case for refusing to imply a promise does not apply.

Moreover, it cannot be said in this case that the legislature has merely indicated "a course of conduct to be pursued until circumstances or its views of policy change" (191 U. S. 388). Under the law of Indiana the property of appellant corporations is irrevocably dedicated to charitable use, and cannot be withdrawn regardless of change in legislative policy. *Richards* v. *Wilson* (1916), 185 Ind. 355.

(c) *East Saginaw Salt Manufacturing Company* v. *City of East Saginaw* (1872), 13 Wall. (80 U. S.) 373, 20 L. Ed. 611, is likewise distinguishable on all grounds of decision. Here the corporate privileges, including tax exemption, have been offered only upon condition that the enterprise be incorporated for religious, educational or charitable purposes and not for private profit. Compliance with these conditions has irrevocally committed the property of appellants and their donors to uses beneficial to the public alone. There the inducement was offered without incorporation to all persons so long as they continued a purely commercial venture from which they were at liberty to withdraw at any time.

2. We believe that the Supreme Court of Indiana erred in refusing to follow:

Piqua State Bank v. *Knoop* (1853), 16 How. (57 U. S.) 369, 14 L. Ed. 977;

Home of the Friendless v. *Rouse* (1869), 8 Wall. (75 U. S.) 430, 19 L. Ed. 451;

Washington University v. *Rouse* (1869), 8 Wall. (75 U. S.) 439;

University v. *People* (1879), 99 U. S. 309, 25 L. Ed. 387;

St. Anna's Asylum v. *New Orleans* (1882), 105 U. S. 362, 26 L. Ed. 188.

VII

Cases Believed to Sustain Jurisdiction

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

University v. *People* (1879), 99 U. S. 309;
Yazoo & Mississippi Valley R. R. Co. v. *Thomas* (1889), 132 U. S. 174, 184;
Gulf & Ship Island R. R. Co. v. *Hewes* (1901), 183 U. S. 66, 68;
Carondelet Canal Co. v. *Louisiana* (1914), 233 U. S. 362, 375-378);
Clyde v. *Gilchrist* (1923), 262 U. S. 94, 97;
Millsaps College v. *Jackson* (1927), 275 U. S. 129, 132;
Municipal Investors v. *Birmingham* (1942), 316 U. S. 153, 154.

Appellants therefore pray that this court assume jurisdiction of this appeal and that the judgment and decree of the Supreme Court of Indiana be in all things reversed.

(Signed) FRANK C. DAILEY,
GEORGE E. HERSHMAN,
OTHNIEL HITCH,
PAUL Y. DAVIS,
Counsel for Appellants.

APPENDIX "I"

Opinion of Indiana Supreme Court

IN THE SUPREME COURT OF INDIANA

No. 28154

December 11, 1946 15th Judicial Day November Term 1946

GRAND LODGE HALL ASS'N, I. O. O. F. OF INDIANA, et al.,

vs.

RALPH F. MOORE, as Auditor of Marion County, Indiana, etc., et al.

Appeal from Marion Circuit

RICHMAN, J.:

Upon appellants' petition for a declaratory judgment, evidence was heard, followed by a special finding of facts, conclusions of law and judgment for appellees. The conclusions are here assigned as error. It is found that each appellant is incorporated under and pursuant to Ch. 246 of the Acts of 1921, §§ 25-1101-1109, Burns' 1933, for purposes authorized by the Act and has acquired and owns valuable property, including real estate, the net income from which is used exclusively for the authorized educational, religious or charitable purposes. Included in the real estate described in the findings are the Odd Fellow Building at Pennsylvania and Washington Streets, the English Hotel Building on Monument Circle and the Indiana Pythian Building at Pennsylvania Street and Massachusetts Avenue, all in Indianapolis. The real estate involved in the controversy is rented for secular purposes, some of the rent received being used to reduce mortgages but otherwise being applied to the corporate purposes. After its acquisition by the respective corporations, all of the real estate was taken from the tax duplicate as exempt pursuant to Section 9 of the Act of 1921. In 1937 the Act of 1921 was amended by provision that such property should continue to be exempt

until March 1, 1944, but thereafter the exemption should not apply unless the property be "occupied and used exclusively for such (corporate) purposes and objects." Acts 1937, Chapter 146, p. 814, § 25-1109 Burns' 1933 Supp. This proceeding was begun prior to that date in anticipation of action of the appellee taxing officials in assessing and levying taxes upon the real estate. It is contended by appellants that their property, though rented for secular purposes, is still within the exemption of the 1921 Act which by their respective acceptances and incorporation thereunder became contracts protectable by both state and federal constitutions against any impairment of the Act of 1937.

Authority for legislation exempting property from taxation is found in Art. 10 § 1 of the Indiana Constitution, reading:

> "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

It permits without restraint the enactment of a statute exempting any or all of the six kinds of property mentioned. Not only is it so stated but it was so intended as is clearly shown by discussion of the section in the Constitutional Convention. The thought of the founders (there were a few dissenters) is summed up by Mr. Maguire who "thought it the duty of the Convention, if any section about taxation should be adopted, to recognize the principle of exemption for such purposes leaving the details to the sound discretion of the legislature." Debates of Indiana Convention, 1850, p. 1290. See pp. 1285-1291, inclusive and particularly comments by Messrs. Read, author of the section, Colfax and Kilgore. The words "by law" at the end of the section may be thought to imply that exemption may not be made by legislative contract but nothing was said in the convention to that effect. Mr. Read no doubt was thinking of the ordinary function of the General Assembly which is to make laws, not to make contracts.

It is settled, we think that an Act of the legislature may at the same time be both a law and also an obligation of the State within the protection of the contract clauses of our constitutions. This is true both of special and general acts. Of the latter class was the contract sustained in *The Piqua Branch of the State Bank of Ohio v. Knoop* (1853), 57 U. S. 369, 14 L. Ed. 977. See *Stanislaus County v. San Joaquin & K's R. C. & I. Co.* (1904), 192 U. S. 201, 48 L. Ed. 406. See also *Indiana ex rel. Anderson v. Brand* (1938), 303 U. S. 95, 82 L. Ed. 685.

The intent of the legislature to enter into a contract with an artificial body of its creation ought to be apparent from the law which is alleged to constitute the contractual obligation. When that law is a special act addressed to a particular group of incorporators to meet a sptcific need or purpose the intent to contract is more easily discerned than when the law is general, addressed to no one in particular group of incorporators to meet a specific need or ticular but available to all of a class as a vehicle for incorporation so long as it stands unrepealed. The cases we have found wherein the legislative contracts have been sustained as inviolable by the United States Supreme Court were, with the exception of the *Knoop* case, supra, in the former category. Upon several of these cases appellants rely, particularly *Northwestern University v. People* (1878), 99 U. S. 309, 25 L. Ed. 387. But even a special act applying to one charitable corporation only and providing that certain of its real estate and ground rents "so long as the same shall continue to belong to the said hospital shall be and remain free from taxes" was held not to constitute an irrevocable contract. *Christ Church v. Philadelphia County* (1861), 65 U. S. (24 How.) 300, 16 L. Ed. 602. The opinion states:

> "This concession of the legislature was spontaneous, and no service or duty, or other remunerative condition, was imposed on the corporation. It belongs to the class of laws denominated privilegia favorabilia. It attached only to such real property as belonged to the corporation, and while it remained as its property; but it is not a necessary implication from these facts

that the concession is perpetual, or was designed to continue during the corporate existence."

This was the earliest case we have found in which the Supreme Court enunciated this view. It was a new conception and therefore without direct authority. Three cases are cited in support thereof by Mr. Justice Campbell but the analogy between either of them and the case then before the court was not very close. Eleven years later the court was considering a general act of the State of Michigan the first section of which authorized the incorporation of companies to bore for and manufacture salt. The next section provided, "All property, real or personal, used for the purposes mentioned in the 1st section of this act, shall be exempt from taxation for any purpose." The court said: "Such a law is not a contract except to bestow the promised bounty upon those who earn it so long as the law remains unrepealed. There is no pledge that it shall not be repealed at any time." *East Saginaw Sale Manufacturing Co. v. City of East Saginaw* (1872), 80 U. S. 373, 20 L. Ed. 611, 2 Am. Rep. 82.

These two and other cases were before Mr. Justice Holmes when he wrote the opinion in *Wisconsin & Michigan R. Co. v. Powers* (1903) 191 U. S. 379, 48 L. Ed. 229, which dealt with a general act of the State of Michigan levying a specific tax upon railroads but providing that it should "not apply to any railway company hereafter building and operating a line of railroad within this state north of parallel forty-four of latitude until the same has been operated for the full period of ten years . . ." The learned justice first undertook to apply to the facts the elementary rules used by courts and law writers to determine the existence of a contract. He said that "the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present." But he added that "the promise and the consideration must purport to be the motive, each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting." He added that in the case before him "the two things are not set against

each other in terms of bargain", but he declined to put the decision on this ground alone saying:

> "The broad ground in a case like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy, and providing for carrying it out, it may open a chance for benefits to those who comply with its condition, but it does not address them, and therefore), it makes no promise to them. It simply indicates a course of conduct to be pursued until its views of policy change."

Whether the statute offers "privilegia favorabilia", or a "bounty" or a "chance for benefits", or something similar by some other name, the principle is the same. We think these cases rule the case before us, for we are not able in the Act of 1921 to find any suggestion that the legislature intended to or did promise complete and permanent exemption from taxation. Such a promise is out of harmony with the previous public policy of the state as declared by every General Assembly since 1942 that has assumed to deal with the tax exemption. We might add that this public policy, which is for the legislature to declare, was evidently approved by certain judges of this court who let their own views creep into their opinion. See Orr *v.* Baker (1853), 4 Ind. 86 (construing an 1843 statute); *City of Indianapolis v. The Grand Master, etc.* (1865), 25 Ind. 518. With the exception of property of governmental units or institutions Indiana tax exemption statutes usually if not universally have made the exemption of real property depend upon the use to which the property is put. The last general revision of the tax laws of the state was made in 1919. Ch. 59 Acts 1919. The exemption section, § 5, was amended in 1920 and this section in turn amended in 1921 by the same General Assembly that is now supposed to have promised appellants unrestricted and permanent exemption. Chapter 222 Acts 1921, pages 638-646, § 64-201 Burns' 1943 Repl. This act contained an emergency clause which made it effective March 10, 1921, the same day the Foundation and Holding Company Act was approved by the Governor. Chapter 4

of the Acts of 1921 also seeks to amend § 5 of the 1919 Act which amendment was doubtless deemed ineffective because that section had already been amended. This brief legislative history shows that four times within two years ending March 10, 1921, the legislature had exemptions under consideration without making any substantial change as to religious and charitable institutions. The exempton of religious societies provided in § 64-201 is confined to the building used for religious worship, its furniture, the parsonage "occupied as such", and "the land whereon said building or buildings are situate, not exceeding fifteen acres . . ." The predecessor of this section was held in *Orr v. Baker, supra,* not to exempt leased store buildings next door to its church on a lot of less than 15 acres owned by the Methodist Church of Evansville. A "fraternal beneficiary association" under the eleventh clause of the 1921 amendment is exempt as to its property "except real estate not occupied by such association in carrying on its business." These illustrations are sufficient to show the general policy as to tax exemption of real property held by benevolent purposes. We have insuperable difficulty in finding that this general public policy was intended to be changed or exceptions thereto created by Act of 1921 upon which appellants rely as a contract. It does not meet the test of promise set against detriment or change of position in terms of bargain. But as Mr. Justice Holmes said, "the broad ground" in that the Act makes no promise but "simply indicates a course of conduct to be pursued until its views of policy change." Reading it in *pari materia* with Ch. 222 it might reasonably be argued that the exempton in § 9 of Ch. 246 was to be limited by the use to which the real estate should be devoted. Administrative officials, however, construed it differently and removed appellants' real estate from the tax duplicate. Assuming that they were right in its construction we still are unable to see that the exemption was intended to be permanent. The argument in support of that view is that the life of corporations organized under the Act is not limited in time and therefore may be deemed to be perpetual. From this premise the argument is made that because the exemption contained in § 9 is not limited in time it therefore must also be deemed to be perpetual. Against

this view is the principle that a contract containing no specific termination date is terminable at will and the further rule that where the parties fix no time for the performance or discharge of obligations created by the contract they are assumed to have had in mind a reasonable time. It can not be doubted that an exemption created in 1921 and extended in 1937 to 1944 has existed for a reasonable time.

We are aware that in *Home of the Friendless v. Rouse* (1869), 75 U. S. 430, 19 L. Ed. 495, it was said that to add the word "forever" after the clause "all property of said corporation shall be exempt from taxation" could "not make the meaning any clearer." But against this case we set *Christ Church v. Philadelphia County, supra,* wherein Mr. Justice Campbell, after stating, as above quoted, that there was no necessary implication that freedom from taxation was to be "Perpetual, or was designed to continue during the corporate evidence", made the following statement:

> "Such an interpretation is not to be favored, as the power of taxation is necessary to the existence of the state, and must be exerted according to the varying conditions of the commonwealth. The act of 1833 belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the legislature. All laws, all political institutions, are dispositions for the future, and their professed object is to afford a steady and permanent security to the interests of society. Bentham says 'that all laws may be said to be framed with a view to perpetuity; but perpetual is not synonymous to irrevocable; and the principle on which all laws ought to be, and the greater part of them have been established, is that of defeasible perpetuity—a perpetunity defeasible by an alteration of the circumstances and reasons on which the law is founded'."

In *Northwestern University v. People, supra,* the special act under which the corporation was chartered was amended with a clause reading: "That all property, of whatever kind or description, belonging to or owned by said corpora-

tion, shall be forever free from taxation for any and all purposes." This inclusive, emphatic statement leaves no room for doubt or construction as to the legislative intent. But it was addressed and made with respect to a specific corporation and, we may assume, with its needs and objectives fully in mind. We are unwilling to apply such a precedent to a general act addressed to no one in particular, the principal purpose of which obviously was to furnish a method of organization for corporate activity. The person who drafted it may have had the learning and foresight to anticipate reliance upon it sometime as a contract for perpetual exemption but we doubt if any legislator had any such conception. From beginning to end it contains no suggestion of a contractual obligation to be assumed by the state. The title is, "An Act concerning the organization of foundation or holding companies and prescribing their powers and duties," which obviously contains no warning that the legislature in its enactment intends to surrender permanently any part of the sovereign power of taxation. The only mention of taxation is in the last sentence of the last section: "Property held by such corporation exclusively for religious, educational or charitable purpose shall be exempt from taxation." The word "exclusively" suggests a limitation which appellees contend relates to use. It may be so, although the word "held" is not synonymous with "used". See *Northwestern University v. People, supra.* If it were given such a meaning the act would be consistent with general public policy as found in previous and concurrent legislation as to tax exemptions. But against this construction is the administrative interpretation, in keeping the real estate off the tax duplicate from 1921 to 1937, despite its known use for secular purposes, and the legislative interpretation manifest in the Act of 1937 which provides "that all real and tangible personal property now held by such corporations . . . but not occupied and used exclusively for such purposes and objects shall *continue* to be exempt from taxation . . . until March 1, 1944." (Our italics.) We prefer, therefore, not to put our decision on a strained construction of the language of this sentence, even though so to do would make it harmonious with the

public policy declared by previous statutes and the one in *pari materia* which amended the 1919 act.

Looking at the holding company act of 1921 as a whole, in the light of the opinions of the United States Supreme Court above quoted, and particularly the decision in *Christ Church v. Philadelphia County*, we are unable to find in it the intent to promise these corporations more than a present tax exemption, a privilege that might in the wisdom of a future Geenral Assembly be and was taken away by the Act of 1937.

Judgment affirmed.

APPENDIX "II"

INDIANA ACTS 1921, CH. 246, PP. 730-731

An Act concerning the organization of foundation or holding companies and prescribing their powers and duties. (S. 274. Approved March 10, 1921.)

Foundation or Holding Companies

Section 1. Be it enacted by the general assembly of the State of Indiana, That any number of persons not less than nine (9) may associate themselves together as a body corporate as a foundation or holding company in the manner and for the purpose hereinafter designated.

Articles of Incorporation

Section 2. The incorporators shall sign and acknowledge articles of incorporation and file a copy thereof in the office of the secretary of state for the State of Indiana, and a duplicate thereof in the office of the county recorder of the county where the general offices of the corporation are to be located. Such general office shall be in the State of Indiana, and the articles of incorporation shall designate the county in which they shall be located.

Purpose of Organization

Section 3. The articles of incorporation shall state the purposes for which the same is organized, which shall be

to promote religious, educational or charitable purposes or all of them.

May Receive Gifts and Bequests

Section 4. Such corporation may receive by gift, devise, bequest or otherwise any money or property absolutely or in trust to be used, either the principal or the income therefrom, for the furtherance of any of the above mentioned purposes as designated in the charter.

Board of Directors

Section 5. The number of members of the board of directors of such corporation shall be not less than nine (9) nor more than fifteen (15). The articles of incorporation shall designate the persons who shall constitute the first board of directors, giving the place of residence of each, the length of time each shall serve and the manner of electing their successors and filling vacancies. Provided the members of said board shall be divided in three groups as nearly equal in number as possible, one group shall serve for one year, one group for two years and one group for three years; and thereafter the term for which a member of said board shall serve shall be three (3) years, except in case of an election to fill a vacancy, which shall be for the unexpired term for which the member is elected. The number of members of the board of directors of such corporation may be increased or decreased by resolution of the board, provided, however, there shall at no time be more than fifteen (15) nor less than nine (9) members.

Members to Receive No Pecuniary Benefit

Section 6. No member of such corporation may receive any pecuniary benefit from the same, except such compensation as may be allowed for services actually rendered.

Officers

Section 7. The board of directors may fix by law the title and number of officers of such corporation and the term during which each may serve.

Seal

Section 8. The articles of such corporation shall describe the corporate seal.

Real Estate and Taxation

Section 9. Such corporation may hold and convey any real estate necessary for the transaction of its business or the execution of any trust. Property held by such corporation exclusively for religious, educational or charitable purpose shall be exempt from taxation.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1110

GRAND LODGE HALL ASSOCIATION, I. O. O. F. OF INDIANA, A CORPORATION, ET AL.,

Appellants,

vs.

RALPH F. MOORE, AS AUDITOR OF MARION COUNTY, INDIANA, ET AL.,

Appellees.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

FRANK C. DAILEY,
GEORGE E. HERSHMAN,
OTHNIEL HITCH,
PAUL Y. DAVIS,
1100 Hume-Mansur Building,
Indianapolis 4, Indiana,
Attorneys for Appellants.

THE BYNUM-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

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Appellants,

vs.

RALPH F. MOORE, AS AUDITOR OF MARION COUNTY, INDIANA, ET AL.,

Appellees.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

Appellee's Motion to Dismiss or Affirm (R. 321) is supported only by a "Statement of Matters and Grounds Making Against the Jurisdiction of this Court", filed under paragraph 3 of Rule 12 (R. 313-320). This Brief is, therefore, a reply to such statement.

Reference is made to the Jurisdictional Statement, filed under Rule 12 for a statement of the Nature of the Action and the Assignments of Error (R. 282-294).

(This brief is not intended to be an exhaustive treatment of the merits of the appeal, but only to meet the appellees' contention that the constitutional issues involved are either foreclosed by authority or otherwise so unsubstantial as to warrant dismissal.)

I.

The "Previous Decisions of This Court" Asserted to Support the Decision of the Supreme Court of Indiana and to Foreclose Appellants' Contentions, Are Not Controlling.

The inapplicability of *Wisconsin & Michigan R. Co.* v. *Powers* (1903) 191 U. S. 379, 48 L. Ed. 229, *Salt Company* v. *East Saginaw* (1872) 80 U. S. 373, 20 L. Ed. 611, and *Christ Church* v. *Philadelphia County* (1861) 65 U. S. (24 How.) 300, 16 L. Ed. 602, has already been pointed out in the Jurisdictional Statement (R. 291-292). We believe, moreover, that Appellee's statement of *Wisconsin & Michigan R. Co.* v. *Powers* (1903) 191 U. S. 379, 48 L. Ed. 229, is slightly misleading. Mr. Justice Holmes did not deny "consideration" in the ordinary sense. "* * * the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present." (191 U. S. 386.) The element not "present" was that promise and detriment must be inducements each for the other. The reason given for failing to find this element was stated as follows:

> "The broad ground in a case like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law."

The reason thus expressed does not apply to the instant case, for here the only "benefits" to be anticipated were benefits to the public at large. Neither appellant corporations, their incorporators, nor the donors of their property could anticipate or be motivated by "benefits" other than self satisfaction arising from altruism. Surely this does not preclude inference of an intent to promise tax exemption in return for the irrevocable dedication of assets to public charity. On the contrary, it should properly be inferred that enhancement by tax exemption of the income available for charity was held out as an inducement for incorporation and donation.

Appellees are also in error in asserting that the exemption in *Salt Company* v. *East Saginaw* (1872) 80 U. S. 373, 20 L. Ed. 611 was to "corporations" alone. It was a general exemption conditioned upon engaging in salt production, but requiring no permanent or irrevocable action for its enjoyment, and, for that and other reasons inapplicable here, was held to be non-contractual.

The additional case cited, *Grand Lodge F. and A. Masons of Louisiana* v. *New Orleans* (1897) 166 U. S. 143, is exactly on a par with *Christ Church* v. *Philadelphia County* (1861) 65 U. S. (24 How.) 300, 16 L. Ed. 602 and inapplicable for the same reason; namely, total lack of consideration for the grant, as is evidenced by the following quotation:

> "The alleged contract for exemption was not contained in the charter—as in other cases where such exemption has been sustained—since the lodge had already pledged its revenues to charitable purposes; and when the act was passed it gave no additional pledge, and promised nothing which it had not already promised, and was bound in honor to perform."

II.

Appellees Do Not Sucessfully Distinguish the Cases Relied Upon by Appellant.

While it is true that in *Piqua State Bank* v. *Knoop* (1853) 16 How. (57 U. S.) 369; 14 L. Ed. 977 the court held that "the provisions of the statute under which such banks were organized * * * was a contract", the reasons for so holding exist *a fortiori* in the instant case. The Piqua case presented, and this case does not, elements of private benefit to incorporators which subsequently were held to warrant inference of intent not to contract. We suggest also that there is to be found, in Indiana, constitutional and judicial history subsequent to 1852 affording as much basis for the general thesis that the charter of a corporation is a contract, not subject to subsequent alteration as mere matter of legislative policy, as there was in Ohio in 1853. Further discussion of this background will be found in Subdivision III of this brief.

The attempted distinction of *Home of the Friendless* v. *Rouse* (1869), 8 Wall. (75 U. S.) 430, 19 L. Ed. 451 and *Washington University* v. *St. Louis* (1869), 8 Wall. (75 U. S.) 439, on the basis that these corporations were chartered by special act and not by general law, is negatived by the decision of this court in *Piqua State Bank* v. *Knoop* (1853), 16 How. (57 U. S.) 369.

The Piqua Bank was not specially chartered but was formed under a general law as are appellants here.

III.

The Clear Intention to Create a Contractual Tax Exemption, Required by the Decisions of This Court Cited by Appellees Under "C" of Their "Statement of Matters Making Against Jurisdiction", Is Manifest by Indiana Acts 1921, Ch. 246, § 9, Particularly When Viewed in the Light of Prior and Contemporaneous Legislative History, Which We Submit the Indiana Supreme Court Misinterpreted and Misapplied.

(a) The two Indiana cases cited by the Supreme Court of Indiana, *Orr* v. *Baker* (1853), 4 Ind. 86, and *City of Indianapolis* v. *The Grand Master, etc.* (1865), 25 Ind. 518, did not involve any question of contractual tax exemption, but only the determination of the extent of general exemptions, admittedly non-contractual, granted respectively to churches, and "charitable institutions"; applying in the one case to "every building erected for religious worship and the land upon which the same is situate" and in the other to "every building erected for the use of any benevolent or charitable institution and the land upon which the same is situate." In each case, the court construed the exemption to be inapplicable to such portion of the buildings and real estate in question as were not used for religious worship or charitable and benevolent purposes, but were rented to earn income, notwithstanding that such income was applied to "religious" or "charitable" use.

These cases might properly have been (and were) urged as limiting the *extent* of the exemption granted appellants by the Act of 1921, but the Indiana Court expressly decided that § 9 of the Act of 1921 *did exempt* real estate of the character held non-exempt in *Orr* v. *Baker* and *Indianapolis* v. *Grand Master*.

To say that since the Act of 1843 and the Act of 1852,

which were admittedly not contractual, gave a narrower exemption than the Act of 1921, the legislative policy thereby indicated evidences an intent *not to promise* by the Act of 1921, involves an obvious non-sequitur.

(b) The various revisions of the exemption provisions of the general tax law occurring from 1919 to 1921 and referred to by the Supreme Court of Indiana do not in any important particular depart from the previous practice of limiting religious, educational, and charitable exemptions of real estate to that real estate *used and occupied* for religious, educational or charitable purposes, a circumstance in striking contrast to the broader exemptions contained in "An Act for the organization of foundation or holding companies and prescribing their powers and duties," and indicating, at least with respect *to the extent* of the exemption, a departure from the previous practice, not a continuation of it.

(c) The inclusion of this broader exemption, applying to real estate used to earn income devoted to exempt purposes, in an act for the incorporation of foundation and holding companies for promoting religious, educational and charitable purposes rather than in the general tax law, and making the exemption depend upon the ownership of the property by a particular kind of artificial entity rather than upon the physical *use* of the property, indicate an intent to make the exemption a contractual charter privilege, particularly when viewed in the light of Indiana constitutional history and judicial decision.

(1) Abuses flowing from corporate special privilege were a particular concern of the Indiana Constitutional convention which adopted the present constitution and resulted in the provision of Article 11, § 13 that "Corporations, other than banking, shall not be created by special act, but shall be formed under general laws".

(2) But the same Constitutional Convention rejected a proposed amendment to this very article which would have added the words "and that laws conferring corporate powers may be altered and repealed". 2 Debates in Indiana Convention 1850, (Indiana Historical Collections Reprint) p. 1875-1876.

(3) In various decisions, beginning shortly after the adoption of this constitution, the contractual nature and inviolability of corporate charters has been recognized and emphasized by the Supreme Court of Indiana.

Aurora etc. R. Co. v. *Holthouse* (1855), 7 Ind. 59, 61.

Smead v. *Ind'pls. etc. R. C.* (1858), 11 Ind. 104, 110.

Edwards v. *Jagers* (1862), 19 Ind. 407, 415.

Downing v. *Ind. St. Bd. of Agric.* (1891), 129 Ind. 443, 444, 452.

(4) The peculiar inviolability of a corporate charter conferred for educational or benevolent activities, to be supported by donations of public spirited citizens, is asserted in the above cited case of *Edwards* v. *Jagers* (1862), 11 Ind. 415, wherein the court quoted with approval the following language from Justice Story's opinion in the Dartmouth College case:

> "The Crown, then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes, without any interference on its own part, and should be forever administered by the trustees of the corporation, unless its franchises should be taken away by due process of law. From the very nature of the case, there was an implied contract, on the part of the Crown, with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing

up, and founded on a valuable consideration, that the Crown would not revoke or alter the charter, or change its administration without the consent of the corporation. There was, also an implied contract, between the corporation itself and every benefactor, upon a like consideration, that it would administer his bounty according to the terms, and for the object stipulated in the charter." *Dartmouth College* v. *Woodward* (1819), 4 Wheaton 518, 689; as quoted in 11 Ind. 415, 416.

(5) Since the Indiana legislature of 1921 is not to be presumed ignorant of Indiana constitutional history or judicial decisions, the fact that on March 11, 1921, there was adopted a law authorizing the creation of foundation and holding companies and granting as one of their privileges the power to receive property by gift or devise and to hold it exempt from taxation so long as held for authorized corporate purposes, and on the same day there was adopted a revision of the general tax law confirming other less extensive exemptions depending wholly upon *use* of property for like purposes, indicates very strongly that the legislature of 1921 intended the tax exemption of § 9 of Chapter 246 of the Acts of 1921 to partake of all the well recognized contractual inviolability of other provisions of the corporate charter and negatives any legislative intent to grant mere *"privilegia favorabilia"*.

The general principle of construing tax exemptions narrowly and in favor of the sovereign, and its corollary that the sovereign will not be held to have "bargained away" its taxing power except in clear cases are not to be controverted, but neither principle is so patently decisive of the instant case as to make the questions involved "unsubstantial" or frivolous. Among decisions of this court cited by appellees and the Supreme Court of Indiana as directly controlling, *not one* involved a tax exemption *embedded in a corporate charter*, whereas prior decisions of this

court have uniformly held that charter exemptions *were contractual*, notwithstanding the general principles previously mentioned.

Since *Dartmouth College* v. *Woodward* (1819), 4 Wheaton 519, the contractual nature of corporate privileges has been generally recognized, and as heretofore pointed out, certainly as emphatically in Indiana as elsewhere. Since the right to exist as a corporation, and to pursue the authorized purpose of the charter, are recognized in Indiana, as elsewhere, as rights protected by the contract clause from subsequent legislative impairment, the very fact that the incorporating act includes tax exemption as one of the corporate privileges is of itself evidence of the "intent to promise" found absent in the cases denominating such grants mere *privilegia favorabilia*.

Certainly this appeal is not one to be dismissed "upon authority" or distinguished, without opinion, from the long line of cases establishing the contractual nature of corporate charters, and the sanctity of contractual tax exemption. On the contrary, if appellees are to prevail at all, it must be because *Piqua Bank* v. *Knoop*, *University* v. *People*, *Asylum* v. *New Orleans*, and even *Dartmouth College* v. *Woodward* are either to be overruled or limited to an extent to which they have not yet been limited.

Respectfully submitted,

FRANK C. DAILEY,
GEORGE E. HERSHMAN,
OTHNIEL HITCH,
PAUL Y. DAVIS,
Attorneys for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1110

GRAND LODGE HALL ASSOCIATION, I. O. O. F. OF INDIANA, A CORPORATION, ET AL.,

Appellants,

vs.

RALPH F. MOORE, AS AUDITOR OF MARION COUNTY, INDIANA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

CLEON H. FOUST,
Attorney General of Indiana;
FRANK E. COUGHLIN,
First Deputy Attorney General;
WINSLOW VAN HORNE,
Deputy Attorney General;
KARL J. STIPHER,
Deputy Attorney General.

LOUIS B. EWBANK,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1110

GRAND LODGE HALL ASSOCIATION, I. O. O. F. OF INDIANA, A CORPORATION; WILLIAM E. ENGLISH FOUNDATION, A CORPORATION, AND INDIANA PYTHIAN CORPORATION,

Appellants,

vs.

RALPH F. MOORE, AS AUDITOR OF MARION COUNTY, INDIANA; FRANK P. HUSE, AS TREASURER OF MARION COUNTY, INDIANA; VICTOR R. JOSE, AS ASSESSOR OF MARION COUNTY, INDIANA; ROY T. COMBS, AS TOWNSHIP ASSESSOR OF CENTER TOWNSHIP, MARION COUNTY, INDIANA; OTTO WULFMAN, PETER A. BECZKIEWICZ AND WALTER KLEVE, CONSTITUTING THE STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA,

Appellees

STATEMENT OF MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THIS COURT

The record does not Present for Decision any Substantial Federal Question.

A

Appellants' Contentions Are Foreclosed by Previous Decisions of This Court Which Support the Decision of the Supreme Court of Indiana in This Case.

Appellants' assignments of error in substance claim that a provision of a general statute providing for the incorporation of foundation or holding companies for religious, educational or charitable purpose, and under which appellants were incorporated, exempting property held by them from taxation constituted a contract which could not be impaired by the State of Indiana. This question has been before this court on numerous occasions and upon facts simliar to those in this case, this court has held that such a provision in such a statute does not constitute a contract.

In the case of *Wisconsin & Michigan R. Co.* v. *Powers* (1903), 191 U. S. 379, 48 L. Ed. 229, this court held that a provision of a general statute of the State of Michigan which exempted from taxation any railway company hereafter building and operating a line of railroad within that state north of parallel forty-four of latitude until the same has been operated for the full period of ten years, did not constitute a contract so as to prohibit the State of Michigan from taking away that exemption before the expiration of the ten year period. Justice Holmes, who wrote the opinion, held there was no contract because of a lack of consideration therefor and also upon the broad ground that the legislature was not making promises in the statute but framing a scheme of public revenue and public improvements; that it merely indicated a course of conduct to be pursued until its views of policy changed.

Likewise, in the case of *Salt Company* v. *East Saginaw* (1872), 80 U. S. 373, 20 L. Ed. 611 this court held that a

provision of a general statute exempting from taxation the property of corporations now formed or hereafter formed for the purpose of boring for and manufacturing salt did not constitute a contract so as to prohibit the state from taking such exemption away.

Also, in the case of *Grand Lodge F. and A. Masons of Louisiana* v. *New Orleans* (1897), 166 U. S. 143 this court held that a provision of a statute exempting from taxation the hall of the Grand Lodge of F. and A. Masons so long as it was occupied by such lodge as a lodge hall did not constitute a contract so as to prevent the State of Louisiana from taking such exemption away, even though the recipient of such an exemption may have incurred expense on the faith of such exemption.

To the same effect is *Christ Church* v. *Philadelphia County* (1861), 65 U. S. (24 How.) 300, 16 L. Ed. 602.

The principles of the foregoing cases apply directly to the instant case and support the decision of the Indiana Supreme Court that the exemption from taxation contained in a general statute under which all foundation or holding companies might incorporate for religious, educational or charitable purposes did not constitute a contract but only indicated a course of conduct to be pursued by the legislature until its views of policy on taxation changed.

B

The Decisions Relied upon by Appellant as Presenting a Substantial Federal Question Are Not in Conflict With the Decision of the Supreme Court of Indiana in This Case.

The case of *Piqua State Bank* v. *Knoop* (1853) 16 How. (57 U. S.) 369; 14 L. Ed. 977 is clearly distinguishable from the present case. There this court declared invalid a statute of Ohio which sought to change the tax rate appli-

cable to banks incorporated under the law of that state. The court held that the provision of the statute under which such banks were organized, providing for taxation of net profits of banks at the rate of 6% in lieu of all other taxes, was a contract, and that such banks could not be taxed any other way. However, in that case Justice McLean, who wrote the majority opinion, pointed out that such provision of the law for years had been construed by the executive authorities of Ohio, the banks, the profession, the bench and by the public as constituting a contract (p. 378, 381).

He also indicated (p. 382) that there had been unsuccessful attempts to induce banks to organize in Ohio without a compact as to taxation and that this provision of the law was enacted to correct this situation. Finally, this case at least provided for some taxation whereas the instant case, as contended by appellant, would prevent any taxation of appellant and many others in a like situation. The foregoing elements clearly point the distinction between the Ohio case and the case now before this court.

The cases of *Home of the Friendless* v. *Rouse* (1869) 8 Wall (75 U. S.) 430, 19 L. Ed. 451; and *Washington University* v. *Rouse* (1869) 8 Wall (75 U. S.) 439, relied upon by appellant are likewise distinguishable from the present case. In both cases *specific* institutions were *specially* chartered, one for religious purposes, the other for educational purposes, with exemptions from taxation. Moreover, it is to be specially noted that the act of incorporation in each case provided that such charters should not be subject to alteration, suspension and repeal at the discretion of the legislature. Obviously, in those two cases, the legislature had expressly surrendered its right to change the charters of those institutions in any particular, and intended to be bound thereby. In the case at issue, the statute does not

specially charter one institution and exempt it from taxation, but provides for the incorporation under such statute of any and all institutions which organize as foundation or holding companies for religious, educational or charitable purposes. Also there is no provision in such statute that the Indiana Legislature shall have no authority to alter, suspend and repeal any provision of such statute. The foregoing elements distinguish the case now before this court from the two cases above discussed.

In the case of *Northwestern University* v. *People* (1878) 99 U. S. 309, 25 L. Ed. 387, it appeared that the exemption from taxation in the statute specially chartering Northwestern University provided that the property should so remain exempt *forever* from taxation. This indicates a legislative intent to contract which is certainly not present in the case now before this court. To the same effect is the case of *St. Anna's Asylum* v. *New Orleans* (1881) 105 U. S. 362; 26 L. Ed. 188. There was a case of another institution *specially chartered* by the legislature with a provision for a tax exemption, *any law to the contrary notwithstanding.*

Each of the foregoing cases relied upon by appellant contain important elements, not present in this case, which show that the legislature in those cases did intend to make a contract. No such intention is indicated in the case now before this court.

C

To Constitute a Valid Irrevocable Contract of Exemption From Taxation There Must Be Shown a Clear Intention to Do So and in Case of Ambiguity This Court Will Follow the Decision of the State Court Unless Manifestly Wrong.

It has long been established by the decisions of this Court that contracts of tax exemptions must be clearly proved

and the intention shown, and if there is any doubt on the matter, such doubt will be resolved in favor of the State.

Seton Hall College v. *Village of S. Orange,* 242 U. S. 100, 106;

Providence Bank v. *Billings,* 4 Pet. (29 U. S.) 514, 560;

Wells v. *Savannah* (1900) 181 U. S. 531, 539, 540;

Puerto Rico v. *Russell & Co.* (1941) 315 U. S. 610, 624;

Chicago Theological Seminary v. *Illinois* (1903) 188 U. S. 662, 672.

It is also well settled that this Court will lean toward agreement with the State Court on their construction of the statutory provision granting the tax exemption unless such construction is manifestly wrong.

Hale v. *Iowa Bd. of Assessment,* 302 U. S. 95, 82 L. Ed. 72;

New York ex rel. Clyde v. *Gilchrist,* 262 U. S. 94, 67 L. Ed. 883;

Chicago Theological Seminary v. *Illinois* (1903) 188 U. S. 662, 47 L. Ed. 641.

In the case now before this Court the Indiana Supreme Court reviewed the legislative history of the exemption claimed by appellants in this case and the prior decisions of the appellate courts in Indiana interpreting such statutes, and pointed out that such exemptions did not constitute contracts but only indicated a course of conduct to be pursued by the legislature until its views of such policy changed. (Opinion of Indiana Supreme Court attached to appellants' Petition for Appeal).

Such a construction by the Indiana Supreme Court should be followed by this Court unless manifestly wrong, as indicated by the cases last cited above.

Summary

As heretofore shown, the decision of the Supreme Court of Indiana was made in strict accord with previous decisions of this Court and there is no valid basis for distinguishing this case from the decisions in which this Court established such principles. Consequently, there is no substantial Federal question involved, and thus appellees' motion to dismiss or affirm, filed herewith, should be sustained.

(Signed) CLEON H. FOUST,
Attorney General of Indiana,
FRANK E. COUGHLIN,
1st Assistant Attorney General,
WINSLOW VAN HORNE,
Deputy Attorney General,
KARL J. STIPHER,
Deputy Attorney General,
Attorneys for Appellees.

LOUIS B. EWBANK,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1110

GRAND LODGE HALL ASSOCIATION, I. O. O. F. OF INDIANA, A CORPORATION; WILLIAM E. ENGLISH FOUNDATION, A CORPORATION, AND INDIANA PYTHIAN CORPORATION,

Appellants,

vs.

RALPH F. MOORE, AS AUDITOR OF MARION COUNTY, INDIANA; FRANK P. HUSE, AS TREASURER OF MARION COUNTY, INDIANA; VICTOR R. JOSE, AS ASSESSOR OF MARION COUNTY, INDIANA; ROY T. COMBS, AS TOWNSHIP ASSESSOR OF CENTER TOWNSHIP, MARION COUNTY, INDIANA; OTTO WULFMAN, PETER A. BECZKIEWICZ AND WALTER KLEVE, CONSTITUTING THE STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA,

Appellees.

MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF STATE COURT

Now come appellees, Ralph F. Moore, as Auditor of Marion County, Indiana; Frank P. Huse, as Treasurer of Marion County, Indiana; Victor R. Jose, Assessor of

Marion County, Indiana; Roy T. Combs, Township Assessor of Center Township, Marion County, Indiana; Otto Wulfman, Peter A. Beczkiewicz and Walter Kleve, constituting the State Board of Tax Commissioners of the State of Indiana, and move to dismiss the appeal herein on the ground that the case presents no substantial Federal question; and they further move, if the motion to dismiss is not granted, that this Court affirm the decision of the Supreme Court of the State of Indiana on the ground that the questions which the decision of this cause depends are so unsubstantial as to need no further argument, all as appears in the Statement of Grounds Making Against the Jurisdiction of this Court filed herewith.

(Signed) CLEON H. FOUST,
Attorney General of Indiana,
FRANK E. COUGHLIN,
First Deputy Attorney General,
WINSLOW VAN HORNE,
Deputy Attorney General,
KARL J. STIPHER,
Deputy Attorney General,
Attorneys for Appellees.

(Signed) LOUIS B. EWBANK,
Of Counsel.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

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Appellants,

vs.

RALPH F. MOORE, AS AUDITOR OF MARION COUNTY, INDIANA, ET AL.,

Appellees.

APPELLANTS' PETITION FOR REHEARING.

FRANK C. DAILEY,
GEORGE E. HERSHMAN,
OTHNIEL HITCH,
PAUL Y. DAVIS,
Attorneys for Appellants.

THE DONNELLEY-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Appellants,

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RALPH F. MOORE, AS AUDITOR OF MARION COUNTY, INDIANA, ET AL.,

Appellees.

APPELLANTS' PETITION FOR REHEARING.

Appellants, Grand Lodge Hall Association, I. O. O. F. of Indiana, a corporation, William E. English Foundation, a corporation, and Indiana Pythian Corporation, respectfully move the Court to grant a rehearing of the above appeal and to withdraw the decision and judgment of affirmance entered in said cause without opinion on March 31, 1947 and as ground for such motion respectfully suggest that the decision in *Wisconsin & Michigan Railway Company* v. *Powers* (1903), 191 U. S. 379, which was alone cited as authority for affirmance of the judgment herein without opinion, is not decisive or controlling of this appeal for the reasons following:

(a) The tax exemption involved in that case was not contained in an act of incorporation but in a gen-

eral tax law, as appears from the opinion (191 U. S. 384) and is emphasized in the syllabus (191 U. S. 379).

(b) The tax exemption in that case was one of "the clauses in a scheme of taxation which happened to benefit certain parties" (191 U. S. 386) whereas in the instant case power or privilege of holding tax exempt property is conferred upon the same terms and conditions as the right to exist as a corporation and in the incorporating act itself, and wholly apart from the "general scheme" reenacted by the same legislature.

(c) To say of the Indiana Act of 1921, "that in view of the subject matter the legislature is not making promises but framing a scheme of public revenue and public improvement", and that "In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions" (191 U. S. 387) is patently unrealistic, since the only real benefits to be derived from incorporation under Chapter 246 of the Indiana Acts of 1921 were benefits to recipients of corporate charity and benefits to the public and to the State itself by reason of supplementing activities otherwise maintainable from public funds. Whatever decision he might ultimately have reached, we suggest that Mr. Justice Holmes would not have applied either of the above premises or the conclusion that "it does not address them, and therefore makes no promise to them" to the instant case.

(d) The statement that "It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute merely because their interest was obvious and their action likely on the face of the law" (191 U. S. 387) is equally inapplicable. "Interest" is here used in the sense of expectation of pecuniary gain "likely" to induce action, elements wholly lacking here, since whatever

pecuniary advantage arises from the corporate enterprise or flows from the tax exemption itself is prohibited to the corporators and members and must be devoted to religious, educational or charitable purposes. The fact that pecuniary "interest" was "obvious" and action "likely" is stressed equally with the fact that the parties were not "expressly addressed" (191 U. S. 387) and to apply this conclusion to deny the contractual nature of any and all corporate charters or charter privileges derived under general law, because the corporators, or donors of the corporate property are not "expressly addressed" is to attribute to Mr. Justice Holmes both profligacy in diction and murkiness of thought.

(e) Wether legal detriment induced by a condition attached to promissory language constitutes consideration binding a contract, or whether the inducement is a revocable gratuity (as in *Wisconsin & Michigan Railway* v. *Powers,* 191 U. S. 379) is stated by eminent authority to depend upon whether "a reasonable man would or would not understand that the performance of the condition was requested as the price or exchange for the promise". I. Williston, Contracts, Rev. Ed. Sec. 112, p. 380.

(f) Appellants respectfully refer to their "Brief Opposing Motion to Dismiss or Affirm" for statement of the grounds of reasonable understanding that the tax exemption of the Act of 1921 was intended to constitute a "contract".

(g) In conclusion, appellants suggest that the affirmance of this case upon authority of *Wisconsin & Michigan Railway* v. *Powers* (1903), 191 U. S. 379, can be interpreted as meaning (1) That no provision of a corporate charter acquired under general law is contractual because the incorporators are not "expressly addressed", or (2) That no tax exemption contained in such a charter can be deemed contractual. Since the cited case did not involve a charter tax exemption the court has in either alternative announced

a new principle without opinion and, it is respectfully submitted, without sufficient consideration. *Piqua State Bank* v. *Knoop*, (1853) 16 How. 369, not heretofore overruled, is authority contrary to either proposition.

WHEREFORE, appellants pray that rehearing be granted.

FRANK C. DAILEY,
GEORGE E. HERSHMAN,
OTHNIEL HITCH,
PAUL Y. DAVIS,
Attorneys for Appellants.

The undersigned hereby certify that the foregoing petition is filed in good faith and not for delay.

FRANK C. DAILEY,
GEORGE E. HERSHMAN,
OTHNIEL HITCH,
PAUL Y. DAVIS,
Attorneys for Appellants.

No. 1110. GRAND LODGE HALL ASSOCIATION, I. O. O. F., ET AL. *v.* MOORE, AUDITOR OF MARION COUNTY, ET AL. Appeal from the Supreme Court of Indiana. March 31, 1947. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Wisconsin & Michigan R. Co.* v. *Powers*, 191 U. S. 379. *Frank C. Dailey, George E. Hershman, Othniel Hitch* and *Paul Y. Davis* for appellants. *Cleon H. Foust*, Attorney General of Indiana,

Winslow Van Horne, Karl J. Stipher, Deputy Attorneys General, and *Louis B. Ewbank* for appellees. Reported below: 224 Ind. 575, 70 N. E. 2d 19.